SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-189

INLAND TRUCKING CO. and WESLEY MEILAHN, Co-Partners d/b/a OSHKOSH READY MIX CO; COOK & BROWN LIME CO; INLAND TRUCKING CO., and WESLEY MEILAHN, Co-Partners d/b/a WAUPUN READY MIX,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

GENERAL TEAMSTERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL UNION NO. 126, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

BRIEF

For General Teamsters, Warehouse and Dairy Employees, Local Union No. 126, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in Opposition

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 440 F.2d 462 and in the Appendix to the Petition for a Writ of Certiorari at page 4. The Decision and Order of the National Labor Relations Board is reported at 179 NLRB No. 56 and in the Appendix to the Petition at page 11.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1971 (App. A). The petition for a writ of certiorari was docketed on August 7, 1971. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254 (1) and § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (e).

QUESTION PRESENTED

Whether the Court of Appeals properly sustained the findings of the National Labor Relations Board that an employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act by locking out his employees at a time when no strike was imminent and then employing work replacements to continue his operations during that lockout.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are printed at page 3 of the petition.

STATEMENT

The facts of this case were fully explicated by the Trial Examiner in the decision which was adopted by the Board and the Court of Appeals (App. 5, 19-28).

Teamsters Local 126 has been negotiating collective agreements with Petitioner Cook & Brown Lime Co. for almost 40 years, and until the lockout here in issue, there was never a work stoppage by those employees. Petitioners Waupun Ready Mix Co. and Oshkosh Ready Mix Co. have enjoyed equally strike-free relations with the Union, although they are much younger firms. Indeed, the rec-

ord offers no evidence whatsoever of any work stoppage in connection with contract negotiations between the Union and any of the Petitioners.

In 1968 the Union began negotiating with each company individually; these were separate bargaining units, but Oshkosh Ready Mix and Cook & Brown sat at the same table. After only five or six bargaining sessions, Oshkosh and Cook & Brown announced that they would lock out the next day, at the expiration of the then-current contract. When the Union received a telegram confirming this position, it responded with its own telegram, stating that it had no intention of striking at the expiration of the contracts, and, further, promising that each company would be given no less than one week's notice prior to any strike action. Thus, the employers locked out before a bargaining impasse, at a time when they had been assured there would be no strike, and in the context of a bargaining relationship which had never before been interrupted by any strike.

Beyond simply locking out, the employers then hired new employees to replace those represented by the Union. While it appears that the new hires were told they might be temporary, neither the Union nor the locked out employees were informed of this. Thus, even when Waupun's locked out employees offered to resume work on the basis of the employer's last offer, Petitioners refused reinstatement and continued operations with the new employees.

The three employers abandoned their lock out after ten weeks and allowed their original employees to return to work on the conditions set forth in the letter announcing this move. A few days later the Union struck Oshkosh and Cook & Brown; a contract settled the Cook & Brown dispute, but the Oshkosh strike continued until the Union was decertified the following year.

ARGUMENT

The Court of Appeals affirmed the National Labor Relations Board's determination that a single employer lock out[1] supported by the use of new hires was inherently destructive of employee rights. The Court concluded that,

> "Such lock out forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a strike of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operations. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and context of that right, as protected in 29 USC § 157" (Appendix to Petition, at App. 8; the Board's discussion on this point is found at App. 43-44).

Thus, the Court of Appeals and the Board have held that the use of the lockout as a weapon in collective bargaining is not unlimited and the fact that it is permitted in defensive efforts to protect the integrity of a multi-employer bargaining unit against a "whipsaw strike"

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[1] Throughout the case, the bargaining relationship has been treated as three single employer bargaining units, not a multi-employer unit of the type in **NLRB v. Brown**, 380 US 278, and **NLRB v. Truck Drivers Union (Buffalo Linen)**, 353 US 87.

(as in **Brown**, *supra*, and **Buffalo Linen**, *supra*), does not mean that it can be combined with the use of temporary replacements as an offensive means to chill employee support for bargaining.

Petitioners assert that the decisions below conflict with established principles, invite reversal, and, if allowed to stand, impair free collective bargaining. But the opinions in this case acknowledge the special needs of multi-employer bargaining, which warranted the use of replacements in **Brown**, but not in **American Ship Building Company v. NLRB**, 380 US 300, 308, note 8. The Board and the Court below held that employee rights may not be shattered by a weapon inherently destructive of legally protected activities; and far from interfering with legitimate collective bargaining tactics, these decisions constitute the determination that the use of replacement workers in single employer lockouts will inevitably "entail subordinating expressly protected employee rights in favor of non-expressly protected employer interests to a degree not involved in the validation of the bargaining lockout itself."[2]

Petitioners do not claim that the decision below conflicts with decisions by other Courts of Appeal. There is no allegation that this Court's opinions in **American Ship Building** and **Brown Food** authorized the actions here found to be violations. Rather, they complain because the decisions below accept the proposition that,

> ". . . The single employer who chooses to lock out for bargaining purposes should resign himself to paying the price of a temporary cessation of business. Since he is himself responsible for his dilemma with

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[2] Oberer, **Lockouts and the Law: The Impact of American Ship Building and Brown Food**, 51 Cornell L.Q. 193 (1966), 222; see also: **NLRB v. Erie Resistor Corp.**, 373 US 221.

respect to continued operations, he might fairly be required to take the bitter with the sweet. Put otherwise, his total conduct—the bargaining lock out, **plus** the hiring of temporary nonunion replacements—might be said to 'carry its own indicia of unlawful intent.' " **Oberer**, *supra.*

Petitioners' tactic has been found inherently destructive of employee rights, for it effectively acts as a reprisal for Section 7 activities. Oberer, *supra*, 221-222. This finding neither impairs free collective bargaining nor conflicts with this Court's rulings, but, instead, protects realistic employee participation in the bargaining process.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted

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INLAND TRUCKING CO., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-10) is reported at 440 F. 2d 562. The decision and order of the National Labor Relations Board (Pet. App. 11-56) are reported at 179 NLRB No. 56.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on May 12, 1971. The petition for a writ of certiorari was filed on August 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

443-546—71——1

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) and (3) of the National Labor Relations Act by locking out his employees and employing temporary replacements in their stead, in order to secure [redacted] contract terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Oshkosh Ready-Mix and Waupun Ready-Mix are companies engaged in the sale and delivery of ready-mixed concrete to the building and construction industry in Wisconsin. Cook & Brown is a company engaged in the fabrication of steel products, and the sale and delivery of ready-mixed concrete, fuel oils, steel products, and other related products. (Pet. App. 14–15.) In 1965, all three companies negotiated separate contracts with the Union—General Teamsters, etc., Local Union No. 126—which expired on May 1, 1968 (Pet. App. 19).

From March 29 to April 30, 1968, Cook & Brown and Oshkosh Ready-Mix negotiated jointly with the Union for new contracts (Pet. App. 20–21).[1] On April 30,

[1] Prior to these negotiations, Wesley Meilahn, a co-owner of both Oshkosh Ready-Mix and Waupun, told the Union that he wanted to delay discussion of the Waupun contract until the Oshkosh negotiations were concluded because he desired to con-

Attorney Mueller, representing both companies, told Union representative Wetzel that, unless the companies' current offer were accepted, the companies would lock out the employees upon expiration of the contracts. On May 1, a telegram was sent to the Union confirming Mueller's statement (Pet. App. 21; A. 100–101, 108, 219.),[2] and the companies handed each employee a notice reading (Pet. App. 21–22; A. 70–71, 220–222):

> Negotiations with the Union yesterday ended in deadlock. Our last proposal included a 90 cent wage package (30 cents each year of a 3-year contract) plus other fringes. The Union refused to budge from its previous wage demands totaling $1.85 over 3 years. We advised the Union at the meeting that there would be no work without a contract.
>
> The current labor contract expires at midnight today, May 1, 1968. We believe the Union's refusal to compromise its wage demands has created an unfortunate situation which forces us to engage in a lockout. You are hereby notified not to report to work until further notice.

---

tinue the arrangement under which both companies had similar contracts except for a wage differential of 25 cents (Pet. App. 20).

[2] Following receipt of this telegram, the Union sent each company, including Waupun, a telegram stating that it had no intention of striking at the expiration of the contracts, and promising that, if it changed its mind, it would give each company at least one week's notice (Pet. App. 23; A. 222–223).

"A." refers to the Appendix to the briefs in the court of appeals.

As of May 2, 1968, Cook & Brown had 29 employees on its payroll, including 8 who were on seasonal layoff; Oshkosh had 8 employees at work and 2 on layoff; and Waupun had 4 employees at work. None of these were permitted to return to work until July 17, 1968. (Pet. App. 22; A. 66–69, 146–147, 217–219.) Meanwhile—beginning on May 2—the work ordinarily done by the locked out employees was performed by supervisory employees and by new employees (Pet. App. 22; A. 144–145, 151, 170–172). The companies advised new employees that their tenure might be brief (Pet. App. 22; A. 171).[3]

On several occasions during the lockout the companies refused requests by the Union that the locked-out employees be reinstated—insisting that reinstatement would occur only when agreement was reached with the Union (Pet. App. 24; A. 159–160, 180). On July 15, the companies notified the locked-out employees that, upon application, they would be reinstated on July 17, at a rate of pay specified in the letter and otherwise under the conditions of the expired contracts (Pet. App. 24; A. 226). On July 17, all of the locked-out employees of Cook & Brown returned to work, except one who had quit. At Oshkosh, of the 8 employees who were locked out, 3 quit, 4 returned on July 17, and 1 indicated an intent to return on July 22; 2 other employees who were on layoff at the time of the lockout were also recalled.

[3] Cook & Brown hired 9 new employees by June 15; Oshkosh 12, by June 10; and Waupun 4, by June 19 (Pet. App. 22; A. 69, 157–158, 218).

At Waupun, all 4 employees returned to work. (Pet. App. 12, n. 1, 24–25; A. 79–81.)

B. THE DECISIONS BELOW

The Board found that the companies did not constitute a true multi-employer bargaining unit, but rather bargained with the Union in separate units (Pet. App. 37). The Board further found that, while each company was privileged to lock out its employees in support of its bargaining position, the companies had not established a sufficient business justification for their action in continuing to operate with temporary replacements—an action which was far more destructive of the employees' right to engage in collective bargaining than is a mere lockout (Pet. App. 40–50). Accordingly, the Board concluded that, by continuing to operate with temporary replacements, the companies violated Section 8(a)(1) and (3) of the Act (Pet. App. 50–51). The Board ordered the companies to cease and desist from the unfair labor practices found, to reinstate all of the locked-out employees, and to reimburse them for any loss in earnings (Pet. App. 52–55).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 4–10).

ARGUMENT

The holding of the court below that an employer violates the National Labor Relations Act by locking out his employees and then continuing operations with

temporary replacements is correct and not in conflict with any other decision.

1. In *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, this Court held that "an employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position" (p. 318). The Court concluded that, in the absence of a specific showing of anti-union motivation, a lockout in these circumstances is neither so destructive of employee rights nor so lacking in significant economic justification as to constitute a violation of those provisions of the Act. The Court made plain, however, that its holding was limited to the situation there presented, stating: "we intimate no view whatever as to the consequences which would follow had the employer replaced his employees with permanent replacements or even temporary help. *Id.* at 308, n. 8. The latter situation is presented here, and the Board and the court below reasonably concluded that it called for an unfair labor practice finding.

Where an employer locks out his regular employees but continues to operate with temporary replacements, the coercive impact of such conduct on the former is substantially greater than that resulting from a lockout alone. As the court below noted (Pet. App. 8), it "would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of

their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation."; "[e]mployees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain." In these circumstances, at least in the absence of a showing of a legitimate and substantial business justification for the continued operation (which petitioners failed to make here, see Pet. App. 9–10), it is proper to conclude that the employer's action violated Section 8(a)(1) and (3) of the Act even without specific proof of anti-union motivation. See *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 34; *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378.

2. *National Labor Relations Board* v. *Brown*, 380 U.S. 278, does not require a contrary conclusion. The Court there held that the non-struck members of a multiemployer bargaining group, who had locked out their members in response to a whipsaw strike against another member of the group (Food Jet), did not violate Section 8(a)(1) and (3) of the Act by resuming operations with temporary replacements when the struck employer did so. This "was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike. Since Food Jet legitimately continued business operations, it is only reasonable to regard respondents'